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No. 93-908

Supreme Court, U.S.

FILED

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1993

CHARLES J. REICH,  
*Petitioner,*  
v.

MARCUS E. COLLINS and  
THE GEORGIA DEPARTMENT OF REVENUE,  
*Respondents.*

On Writ of Certiorari to the  
Supreme Court of Georgia

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 8, 1993  
CERTIORARI GRANTED FEBRUARY 22, 1994

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CHRONOLOGICAL LIST OF  
RELEVANT DOCKET ENTRIES

- April 19, 1990—Complaint For Refund Of Taxes Illegally Collected filed in the Superior Court of Clayton County, State of Georgia
- May 21, 1990—Answer filed in the Superior Court of Clayton County, State of Georgia
- December 10, 1991—Order issued by the Superior Court of Clayton County, State of Georgia, Judge Kenneth Kilpatrick
- January 9, 1992—Application for Discretionary Appeal filed by Plaintiff with Georgia Supreme Court
- January 31, 1992—Order from Georgia Supreme Court granting application for discretionary appeal
- February 3, 1992—Notice of Appeal to Georgia Supreme Court filed by Plaintiff in the Superior Court of Clayton County, State of Georgia
- November 19, 1992—Decision issued by the Georgia Supreme Court affirming in part and reversing in part
- November 30, 1992—Motion for reconsideration of appellant filed in Georgia Supreme Court
- December 17, 1992—Order by Georgia Supreme Court denying motion for reconsideration
- January 29, 1993—Petition for Certiorari filed
- June 28, 1993—Petition for Certiorari granted, judgment of the Georgia Supreme Court vacated, and case remanded for further consideration in light of *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993)
- December 2, 1993—Decision issued by the Georgia Supreme Court on remand
- December 8, 1993—Petition for Certiorari filed
- February 22, 1994—Petition for Certiorari granted

[Atlanta Journal and Constitution, 5-C, April 8, 1989]

[Deposition of H. Thomassen, Ex. 2]

## HARRIS REJECTS CALL TO SUSPEND TAXING OF FEDERAL RETIREES

Ga. Not in Line with U.S. High Court

Gov. Joe Frank Harris rejected a recommendation Friday that he invoke an 1821 law to suspend taxation of federal retiree benefits until the Legislature returns next year to bring Georgia in compliance with a recent U.S. Supreme Court ruling.

State Rep. Denmark Groover, Jr. (D-Macon) suggested the governor take action to avoid potential lawsuits.

Georgia law exempts state retirees from paying income taxes on their pensions, but federal retirees are taxed on a total of about \$1.2 billion in pension benefits.

"These [federal] retirees are real upset about it, and they feel like nobody is taking any action on it," Mr. Groover said. "The only thing then would be for someone to pop up and file a lawsuit on it."

The Supreme Court ruled last week that it is illegal for a state to tax the benefits of those with federal government pensions while not taxing the benefits of state government retirees. Barring any further ruling, Georgia either would have to stop taxing the federal retiree benefits or start taxing those of state retirees.

"I do not plan to take such action," Mr. Harris said Friday, adding only that the issue would have to be decided through further "judicial decisions."

Don Steele, director of the state Revenue Department's Income Tax Division, said the department has been bombarded with calls from federal civil service and military retirees about how to qualify for possible refunds on state income taxes they paid on their pensions in 1985. There is a three-year statute of limitations on refunds.

"It has created a great deal of interest, there's no doubt about that," Mr. Steele said.

State Revenue Commissioner Marcus Collins has said he will make no change in Georgia tax collections until a lawsuit forces a change or the General Assembly gives him new tax laws.

State Attorney General Michael J. Bowers said Mr. Collins' position was taken with advice from his office. "We've got a legal dilemma," Mr. Bowers said. "It's virtually certain that this Michigan holding [by the U.S. Supreme Court] applies. The question is what we do about it. You cannot change a tax law without a lawsuit or action by the General Assembly."

The governor of Virginia, one of 15 states affected by the Supreme Court ruling, has called a special legislative session to decide how to cope. That state will suffer a \$150 million-a-year loss if it starts exempting federal retiree pensions, a spokesman in the governor's office said Friday.

"I don't think it's urgent enough to call a special session of the [Georgia] Legislature," Mr. Steele said, "but it's urgent enough that it will have to be addressed by the next regular legislative session."

He said it's possible the state could tax retired state employees, acknowledging that such a move could be a political bombshell, especially with 1990 being an election year.

"But the court ruling," he said, "is very clear. You can't discriminate. What you do for one, you do for the other. We either stop taxing the federal retirees, or we tax the state retirees. The other big question is whether any decision will be retroactive."

The 168-year-old Georgia statute cited by Mr. Groover gives the governor power to "suspend the collection of taxes, or any part thereof, due the state, until the meeting of the next General Assembly."

"I called the governor's office and suggested he suspend collection of that tax [on federal pensions]," Mr. Groover said. "That would at least suspend the problem until the next session of the General Assembly, and then they could address it as they wanted to."

He said that the state probably would have to refund such taxes with interest and added that action now would give those retirees some relief.

"These folks are generally on fixed incomes, and they need what little is not taxed more than the state needs it," he said.

Mr. Groover said he had seen estimates that the revenue loss to the state would be \$40 million a year if it ended the taxation of federal benefits. "And that ain't nothing in the state's budget," he said, "but \$10 a month to a retiree is \$10 a month."

#### Take Refund Steps, Pensioners Advised

If the Georgia Legislature votes next session to refund taxes collected from federal pensions, some 100,000 retired federal employees should take steps now to qualify to receive any refunds that might result.

Don Steele, director of the Georgia Revenue Department's Income Tax Division, recommends the pensioners file state income tax Form 500-X by April 17. There is a two-day grace period between filing the form and the tax deadline because the April 15 deadline falls on a Saturday this year.

The 500-X tax forms can be obtained at 10 different Revenue Department regional offices around the state: the Atlanta office at the Trinity-Washington Building in the state Capitol complex, Albany, Athens, Augusta, Columbus, Douglas, Macon, Rome, Savannah and Tucker.

## IN THE SUPERIOR COURT OF CLAYTON COUNTY STATE OF GEORGIA

Civil Action File No. 89-CV-13238-4

THREE RETIRED SOLDIERS a/k/a AVERY T. SALTER, JR.,  
CHARLES J. REICH, and ROBERT L. NEAL,  
*Petitioners,*

v.

THE STATE OF GEORGIA and  
GOVERNOR JOE FRANK HARRIS and  
STATE REVENUE COMMISSIONER  
MARCUS E. COLLINS, SR.,  
*Respondents.*

[April 14, 1989]

### PETITION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

COMES NOW Petitioners above and show this Court as follows:

1.

Each of the Petitioners resides in Clayton County, Georgia; thus, pursuant to O.C.G.A. §§ 9-4-5, 48-2-35 (b)(4) and 50-13-10; this Court has jurisdiction and venue of this matter.

2.

Respondents can be served by second originals of this Petition as follows:

a. The State of Georgia, c/o State Attorney General MITCHELL J. BOWERS, 132 Judicial Building, Atlanta, GA 30334.

b. Governor JOE FRANK HARRIS, State Capitol Building, Atlanta, GA 30334.

c. State Revenue Commissioner MARCUS E. COLLINS, SR., State Department of Revenue, 270 Washington Street, S.W., Room 410, Atlanta, GA 30314.

### 3.

An actual controversy exists in this case between the parties for the specific reasons enumerated below:

a. The State of Georgia has illegally discriminated against Petitioners (and other retired federal military and civilians residing in the State of Georgia) by assessing income tax at the rate of six (6%) percent of their retired pensions while at the same time and by the same tax code (specifically O.C.G.A. § 48-7-27); exempting State of Georgia retirees from such income tax since 1980. This matter was decided, conclusively and adversely to the State of Georgia, by the United States Supreme Court in its decision in the case of *Davis v. Michigan Department of Treasury*, U.S. — (March 28, 1989).

b. Notwithstanding the *Davis* decision: O.C.G.A. § 48-2-35(b)(1) limits tax refunds applications to only three years—in specific derogation of the holding in *Davis* finding against the Michigan Department of Treasury wherein tax refunds were found to be due Mr. Davis from the period 1979 through 1984. The only exception to Georgia's three year statute of limitations is for service in the Armed Forces which shall "date for three years from discharge." The effect in the instant case is for the State of Georgia to impermissibly insulate itself for prior years (i.e., prior to the three year statute) from payment of tax refunds; *despite* the fact that Petitioners were required during such time (and even to the present) *by state law* to pay such illegal taxes or else risk tax penalties, interest and possibly even criminal jeopardy in the

event they had refused to pay same. The above-named Petitioners have tax refunds due them for years prior to tax year 1985 as well as for 1985 and for tax years thereafter.

c. O.C.G.A. § 48-2-55 permits the State to levy and garnish delinquent taxpayers' assets and O.C.G.A. § 48-2-56 permits the State to lien the taxpayers' property, while O.C.G.A. § 48-2-35 specifically *prevents* the taxpayers from *even commencing* a lawsuit to attempt to recover tax refunds until the *expiration of one year* (emphasis supplied) from the filing of such a claim. Yet there is no corresponding provision to permit the taxpayers, who are due refunds as a result of the illegal tax assessment by Respondents, to either levy, garnish, or lien the State's assets.

d. O.C.G.A. § 48-2-35(a) permits only a *nine (9%)* percent per annum interest rate as to *tax refunds* (although the Form 500X, at Line 13, apparently speaks to a twelve (12%) percent interest rate whether for a refund or a penalty of both; beginning July 1, 1980). However O.C.G.A. § 48-2-40 provides that taxes owed the State by delinquent taxpayers shall be paid at the rate of 1% per month from the date the tax is due.

e. Foregoing provisions of the tax codes have resulted in a failure of Federal and State of Georgia constitutional protection of "due process" and "equal protection" as to the Petitioners (and all such other affected state citizens) and thus should be declared unconstitutional by this Court.

### 4.

This controversy is a "justiceable" controversy, as contemplated by O.C.G.A. § 9-4-2, in that the Petitioners are asserting an adverse claim against Respondents who, *NOTWITHSTANDING* the decision in *Davis*; and despite their apparent awareness of same; have apparently clearly and in a deliberate and confrontational matter have stated their intentions—even publicly to the press—

wherein they claim they will refuse to adhere to the *Davis* decision short of judicial and or legislative actions (see attached copy of 4/8/89 article in the Atlanta Journal and Constitution and elements thereof as highlighted.)

## 5.

By their actions and statements, and their failure to change policy without judicial and/or legislative actions Respondents apparently intend to continue requiring illegal income tax payments and to continue assessing penalties and interest against Petitioners and all other such affected taxpayers; notwithstanding the U.S. Supreme Court decision in *Davis*. Respondents appear to have *no intention* of changing any tax laws, nor procedures for assessment or collection of taxes at this time; thus putting Petitioners (and all other such affected State citizens) not only in civil jeopardy but also possibly subjecting Petitioners (and all other such affected State citizens) to follow-on criminal jeopardy as well.

## 6.

Plaintiffs have incurred, and can reasonably expect to incur further legal expenses by being forced to file this action for their protection from the apparently arbitrary and unyielding decisions taken by Respondents in this matter.

WHEREFORE Plaintiffs pray that this Court:

a. Review this action and set a date for an appropriate Rule Nisi Hearing and trial on its merits; and

b. Declare the provisions of O.C.G.A. § 48-2 *et seq.* unconstitutional to the extent that such code limits tax refund claims to three years and proscribes interest rates and penalties at unequal rates as between taxpayers and the State; and

c. Declare the provisions of O.C.G.A. §§ 48-2-55 and 48-2-56 unconstitutional insofar as it discriminates against

the taxpayer by not permitting the taxpayer the same options as the State has with respect to levy, garnishment and liens; and currently authorized to the State against delinquent taxpayers; and

d. For immediate injunctive relief, prohibiting now, and in the future, the State of Georgia from continuing to assess illegal taxes against Federal retirees pensions for 1988 as well as for tax years prior thereto and for tax years thereafter; and

e. For the costs of filing this action and all reasonable attorney's fees and other costs of litigation due to Defendants actions by their requiring that this matter be taken to Court rather than by being settled by submission of Tax Form 500X (already in existence) or by other reasonable statements and proofs of claim to be submitted by the affected taxpayers; and

f. For such other relief as this Court may deem just and proper.

Respectfully submitted,

/s/ Avery T. Salter, Jr.  
 AVERY T. SALTER, JR.  
 Georgia State Bar #622950  
 Attorney at Law, Pro-Se for himself;  
 and as Attorney for Petitioners  
 CHARLES J. REICH and  
 ROBERT L. NEAL above

Crews, Salter & Gisler, P.C.  
 P.O. Box 951  
 Jonesboro, GA 30237  
 (404) 478-2511



IT-27 (Rev 08/88)  
GEORGIA  
DEPT. OF REVENUE  
INCOME TAX DIVISION  
P.O. BOX 38395  
ATLANTA, GA. 30334  
PHONE (404) 651-9030

1. PER RETURN 2. OUR COMPUTATION

Federal adjusted Gross Income (line 8)	68,838.00 *	68,838.00	REFER TO-225 46 2871 OA 46376
Adjustments	0.00 *	0.00	AREN 259 88 1513 OP 4300388
Georgia adjusted gross	68,838.00	68,838.00	TAX YEAR 1988 DATE 05/16/89 FB03 2
Deductions	5,837.00 *	5,837.00	* OR FROM RETURN AS CORRECTED
Exemptions	4,500.00	4,500.00	
Net taxable income	58,501.00	58,501.00	
Total tax	3,268.00	3,268.00	
Less: Low income credit	0.00	0.00	
Other credit	0.00 *	0.00	
Balance	3,268.00	3,268.00	
Less: Tax withheld	1,357.00 *	1,357.00	
Estimate paid	1,500.00 *	1,500.00	
Other prepay	0.00	0.00	
Paid with return	0.00	0.00	
Balance	411.00	411.00	
Penalty (see code) 2		2.08	
Interest		4.11	

REICH, CHARLES J & SHIRLEY S  
1108 E FAYETTEVILLE RD  
RIVERDALE GA 30298

NOTICE OF PROPOSED ASSESSMENT  
THIS IS TO NOTIFY YOU OF THE STATE REVENUE COMMISSIONER'S INTENT TO MAKE AN ASSESSMENT AGAINST YOU FOR THE TAXABLE PERIOD STATED ABOVE. COLUMN 1 AND 2 CAN GENERALLY BE COMPARED TO SHOW THE ADJUSTMENT BUT IF BOTH COLUMNS ARE THE SAME, USE YOUR RETURN FOR COMPARISON. IF THE BALANCE DUE IS FROM A COMPUTATION OR TAX DUE ON THE RETURN, YOUR RETURNANCE MUST BE FORWARDED IMMEDIATELY. PENALTY AND/OR INTEREST ARE UPDATED ON THE 15TH OF EACH MONTH UNTIL PAID. EXCEPTION - IF A REFUND IS AUTHORIZED, DISREGARD THE ABOVE STATEMENT.

Credit to estimated tax  
Refund-authorized

(OR)

AMOUNT NOW DUE

0.00  
0.00

417.17

◀ An amount shown on this line is being processed for refund to you.

◀ The Georgia Income Tax Law does not provide for installment payments of the amount on this line.

PENALTY CODE: 1. Delinquent filing 2. Late payment 3. Underestimate

SEQ NO.: 506

[REDACTED]

CM NO. 46376

REICH, CHARLES J A SMIRLEY S  
1100 E PAVETTEVILLE RD

**RIVERDALE - RA 30399**

88

04 30206 - 170117

**PAYMENT DUE IMMEDIATELY**  
**SUBMIT THIS COPY WITH YOUR PAYMENT OR INQUIRY**  
**ICES ON THE REVERSE SIDE OF THIS FORM AND MAIL TO THE ABOVE**  
**RETURN OR ASKED YOUR RETURN IS RESPONSE TO THIS NOTICE.**

1

JUNE 15, 1969

Case No. \_\_\_\_\_

This notice is returned without action based upon following:

2) MY LETTER TO MR JERRY A. ROBERTS, THE CHAIRMAN, DEPT OF REVENUE, DATED 3-30-89 AND HAND DELIVERED SAME DATE NOT: SUBMISSION OF '88 GEORGIA FORM 500 (UPPERCASES AND DEMAND FOR REFUND OF OVERPAID STATE TAXES).

b) my clarified mail # P 978 165 721 to same addressee dated 4-12-89, regarding Feb 4-12-89, SUBJ: Filing of Form 500X for the years 1980 thru 1988 with nine (9) enclosures attached thereto

c) Civil Action File no 89-CV-13238-4, Supreme Court, Clayton Co. GA Filed 4-14-89  
THREE Retired Soldiers et al vs STATE Rescue Commission MATTHEW E. COLLINS-52.  
ET AL. "Petition for Declaratory Judgment and Injunctive Relief."

Charles J. Reich 225-46-2871

## IN THE SUPREME COURT OF GEORGIA

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Case No. 47018

MARCUS COLLINS, INDIVIDUALLY AND IN HIS CAPACITY  
AS GEORGIA STATE REVENUE COMMISSIONER, AND THE  
GEORGIA DEPARTMENT OF REVENUE,  
v. *Appellants,*

JAMES E. WALDRON, JACK HOBBS, WALTER CYBART,  
AND ALL RETIRED FEDERAL EMPLOYEES  
SIMILARLY SITUATED,  
*Appellees.*

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[May 24, 1989]

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BRIEF OF APPELLANTS

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## I. STATEMENT OF JURISDICTION

The Supreme Court of Georgia has jurisdiction of this appeal for the reason that this case, in which the constitutionality of a law has been drawn in question, is one in which exclusive jurisdiction is vested in the Supreme Court by Article VI, Section VI, Paragraph II of the 1983 Georgia Constitution. Moreover, the appealed order is one granting interlocutory injunctive relief; consequently, this is an "equity case" within the Supreme Court's jurisdiction by virtue of Article VI, Section VI, Paragraph III of the 1983 Georgia Constitution. Finally, this case concerns state income taxes and is therefore one involving "state revenue" within the meaning of *Collins v. State*, 239 Ga. 400, 236 S.E.2d 759 (1977); hence, the Court of Appeals would be required to transfer this case

to the Supreme Court even if appellate jurisdiction otherwise lay in the Court of Appeals.

## II. STATEMENT OF FACTS

On March 28, 1989, the United States Supreme Court ruled in *Davis v. Michigan Department of the Treasury*, 57 U.S.L.W. 4389 (U.S. March 28, 1989), that income tax statutes of the State of Michigan—which provided for the taxation of federal retirement benefits but exempted retirement benefits paid by the state and is political subdivisions—violated federal law. On April 10, 1989, James E. Waldron, Jack Hobbs, and Walter Cybart, on behalf of themselves and all similarly situated retired federal employees, filed suit in Richmond County Superior Court, contending that Georgia's income tax scheme failed the *Davis* test, and moving for an interlocutory injunction in the form of "an order requiring defendants to place in escrow all state income taxes, quarterly estimates, or withholdings which [defendants] receive on the retirement or pension benefits of former federal employees." (R. 4 through 11, and 12.) The superior court heard the plaintiffs' motion on Thursday, April 13, and on April 14 the court ordered the escrow sought by them. (R. 33 through 37.) On Monday, April 17, the defendants (referred to collectively as "the State") filed with this Court an emergency motion for supersedeas pending appeal. The Court granted the State's motion on Wednesday, April 19. (R. 41.)

## III. ENUMERATION OF ERRORS

The State respectfully submits that the Honorable William M. Fleming, Jr., Judge, Richmond County Superior Court, erred in granting an interlocutory injunction in the form of "an escrow fund [of] all state income taxes collected from [April 14, 1989] on the federal retirement income of former federal employees in Georgia and quarterly payments or withholdings on the same," pending a decision on the legality of the State's income taxation of federal retirement benefits. (R. 36.)

## IV. ARGUMENT AND CITATION OF AUTHORITIES

"The universal test of the jurisdiction of a court of equity to issue injunctions is the absence of a legal remedy by which the complainant might obtain the full relief to which the facts and circumstances entitle him. . . ." *Chadwick v. Dolinoff*, 207 Ga. 702, 703, 64 S.E.2d 76, 77 (1951). "Equity will grant relief only where there is no available adequate and complete remedy at law." *Stewart v. Walton*, 254 Ga. 81, 82, 326 S.E.2d 738, 739 (1985). "[I]t is error for the court to grant an interlocutory injunction in a case where the plaintiff has an adequate remedy at law." *Thomas v. Mayor of Savannah*, 209 Ga. 866, 867, 76 S.E.2d 796, 797 (1953). See also O.C.G.A. §§ 9-5-1, 23-1-4.

Under these well-established principles, the superior court erred in granting an interlocutory injunction in the form of "an escrow fund [of] all state income taxes collected from this date on the federal retirement income or former federal employees in Georgia, and quarterly payments or withholdings on the same . . . ." (R. 36.) Code Section 48-2-35 provides a procedure for the refund of taxes erroneously or illegally assessed or collected; this is clearly an adequate remedy at law, within the meaning of the authorities cited above, so as to preclude the equitable relief ordered by the superior court. See *Helms Bakeries v. State Bd. of Equalization*, 53 Cal. App.2d 417, 421, 128 P.2d 167, 171 (1942) (action under California's Retail Sales Tax Act for the recovery of taxes paid but not due was an "adequate remedy at law," barring injunctive relief); *Oklahoma Tax Comm'n v. Harris*, 191 Okla. 28, 126 P.2d 685 (1942) (taxpayer could not enjoin collection of additional income taxes, in view of "adequate remedy at law" available under statutory refund procedure). See generally *Mize v. Bank of Whigham*, 137 Ga. 798, 799, 74 S.E. 533, 534 (1912) (trial

court erred in requiring an escrow of disputed funds, where there was no evidence that the defendant would be financially unable to pay such judgment as might later be rendered).

At the April 13 hearing, the superior court expressed the following reservations concerning the adequacy of the statutory refund mechanism:

How can the refund be an adequate remedy at law? . . . [Y]ou say there is an adequate remedy at law because you can file a lawsuit; you can go and get . . . a lawyer, or you can go hire . . . an accountant, and you can pay him, but when you get your refund . . . you're not going to be entitled to get any attorney's fees, and you're not going to be able to get any accountant fees. How do you make that person whole?

(Tr. 47.)

But [taxpayers] can't be made whole because they have to hire someone, if they're not intelligent enough to know how to fill out all . . . those forms . . .

(Tr. 48.)

They can't be made whole . . . There is no way they can be made whole if they have to go through all of the trouble and the time of amending a tax return.

(Tr. 50.)

The State respectfully submits that the focus of the superior court—that an individual wishing to use the statutory refund procedure might require professional assistance, and that such costs are not recoverable under the statute—is irrelevant to whether O.C.G.A. § 48-2-35 is an “adequate remedy at law.” There are always costs and expenses incident to pursuing a legal remedy. Moreover, “[e]xpenses of litigation, including attorney fees,

generally are not allowed . . . in the absence of statutory provision therefor.” *Strickland v. Williams*, 234 Ga. 752, 754, 218 S.E.2d 8, 10 (1975). *Accord In Re Olliff*, 184 Ga. App. 846, 847, 363 S.E.2d 158, 159 (1987). If the test of an “adequate remedy at law” were that articulated by the court below, then virtually no remedy would qualify, and equitable relief would be the norm rather than the exception. In fact, this Court has ruled that a legal remedy can be “adequate,” so as to preclude injunctive relief, even where the particular plaintiff is financially unable to pursue the remedy at all. *Morrison v. Roberts*, 195 Ga. 45, 47, 23 S.E.2d 164, 166 (1942) (that individual, who wished to contest dispossessory proceedings for non-payment of rent, was unable to post bond required under statute providing such a remedy, did not justify enjoining the dispossessory). That reasoning should be of equal force here.

The superior court's order itself implicitly recognizes the adequacy of the statutory refund procedure, since it offers the State the option of making a deposit into escrow based on “a good faith estimate of the amount of state income taxes collected from this date on the federal retirement income of Georgia residents.” (R. 36.) The refund procedure of O.C.G.A. § 48-2-35 is the equal of this option, with the only difference being the fund from which refunds might later be claimed, i.e., the general treasury, see O.C.G.A. § 48-2-35(a), or the court-ordered escrow. Individual taxpayers would still have to make claims against the escrow and establish their right to some portion; doing so would entail the same time, “trouble”, and unreimbursable expenses as pursuing refund claims under O.C.G.A. § 48-2-35.

For the reasons above, the superior court was absolutely prohibited from ordering an escrow fund. Even if the lower court had the discretion to grant interlocutory injunctive relief under these facts, however, doing so was an abuse of that discretion. An interlocutory injunction should be refused where it “would operate oppressively on

the [defendant], especially [where] the denial of the . . . injunction would not work 'irreparable injury' to the plaintiff or leave the plaintiff 'practically remediless' in the event [it] 'should thereafter establish the truth of [its] contention.'" *MARTA v. Wallace*, 243 Ga. 491, 495, 254 S.E.2d 822, 824 (1979), quoting from *McKinnon v. Neugent*, 226 Ga. 331, 174 S.E.2d 788 (1970). The Georgia income tax scheme which the plaintiffs challenge has existed for many years; this fact, coupled with the refund mechanism set out in O.C.G.A. § 48-2-35, clearly showed that the plaintiffs faced no prejudice or harm if the Revenue Department were permitted to collect the disputed taxes in the normal fashion, instead of collecting and holding such funds in an escrow, pending a decision on the plaintiffs' constitutional challenge.

By contrast, the lower court's escrow order threatened the State with immediate and severe harm. As of April 12, there were in excess of 1,000,000 personal income tax returns yet to be filed for the tax year 1988. (Tr. 81.) To isolate those returns which included federal civil service or military retirement benefits, to manually recalculate each such return remitting additional income tax to determine what portion of the remittance was attributable to federal retirement benefits, and to establish and administer a special fund for the disputed taxes to be set aside, would have required the Revenue Department to completely reallocate its resources, during the height of the filing and processing season. (Tr. 81 through 83.) Moreover, since Georgia individual estimated tax returns provide no information at all concerning the sources of income or deductions used to make the estimate, it would have been impossible to determine from the estimated tax returns themselves even if federal civil service or military benefits had been included in the estimated tax calculations. (Tr. 83 and 84.) When equitable relief is sought, the equities as between the parties should be balanced, and the balance in this case clearly weighed in favor of

the State and against the relief ordered by the superior court.

The taxpayers' prayer for injunctive relief, and the superior court's escrow order, rely almost exclusively on the decision in *Georgia v. Private Truck Council of America*, 258 Ga. 531, 371 S.E.2d 378 (1988). That case, however, involved a situation wholly unlike that here. *Private Truck Council* concerned a declaratory judgment action brought prior to the effective date of State Regulation 560-9-2-13, which had been promulgated to implement 1984 amendments to Georgia's highway use tax statutes, see O.C.G.A. §§ 40-2-111 and 40-2-112, and which greatly increased amounts previously paid by the affected taxpayers in that case. (Tr. 63, 66 and 67.) The Fulton County Superior Court established an escrow of the disputed taxes "[i]n order to preserve the status quo . . . ." (Tr. 77.) Here, the challenged tax scheme has been in place for many years; maintaining the status quo would be to allow the State to continue administering the income tax statutes as they have long existed, leaving taxpayers to their refund remedy under O.C.G.A. § 48-2-35 if it is eventually determined that the disputed taxes were "erroneously or illegally assessed and collected."

In addition, *Private Truck Council* dealt with taxes which, if unconstitutional, were invalid as to all those paying and as to all amounts paid. Here, federal retirees constitute only a percentage of the total number of persons filing income tax returns, the returns of such federal retirees are not normally singled out for special handling or processing, and only a portion of any retiree's remittance might be attributable to the inclusion of disputed federal retirement benefits. In short, the escrow in *Private Truck Council* presented none of the administrative difficulties that make the superior court's escrow order in this case most objectionable.

Finally, *Private Truck Council* concerned a Commerce Clause challenge to "taxes on vehicles registered in certain

states which are not imposed on vehicles registered in . . . Georgia." 258 Ga. at 532-33, 371 S.E.2d at 380. "One of the fundamental purposes of the Clause 'was to insure . . . against discriminating State legislation,'" *Bacchus Imports v. Dias*, 468 U.S. 263, 271 (1984), quoting from *Welton v. Missouri*, 91 U.S. 275, 280 (1876), which impose "a disadvantage upon nonresidents," *Austin v. New Hampshire*, 420 U.S. 656, 667 n. 12 (1975). Since *Private Truck Council* involved non-residents, a group without a direct political voice in the state, it may have been appropriate to assign greater weight to the equities favoring a court-ordered escrow, or to apply a more exacting standard for deciding whether an "adequate" legal remedy existed. Cf. Case Comment, *Racial Discrimination and the Tax Injunction Act: Garrett v. Bamford*, 90 Harv. L. Rev. 616, 623 (1977) ("[A]n allegation of discriminatory tax treatment on the basis of race . . . would justify heightened scrutiny in order to insure that state procedures and remedies can adequately protect plaintiffs' rights.") Such circumstances are not present here.

## CONCLUSION

Because O.C.G.A. § 48-2-35 provides a procedure for the refund of taxes erroneously or illegally assessed and collected, the taxpayers had an adequate remedy at law precluding the equitable relief ordered by the superior court. Even if the superior court had the discretion to grant interlocutory injunctive relief under these facts, however, doing so was an abuse of that discretion. Moreover, the decision in *Private Truck Council* should be limited to its particular facts, which are wholly unlike those in the present case. For these reasons, the superior court erred in ordering the escrow fund and should be reversed.

Respectfully submitted,

MICHAEL J. BOWERS  
Attorney General

H. PERRY MICHAEL  
Executive Assistant Attorney General

/s/ Harrison Kohler  
HARRISON KOHLER  
Deputy Attorney General

/s/ Verley J. Spivey  
VERLEY J. SPIVEY  
Senior Assistant Attorney General

/s/ Warren R. Calvert  
WARREN R. CALVERT  
Assistant Attorney General

132 State Judicial Building  
Atlanta, Georgia 30334  
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IT-57 (Rev 12/87)  
GEORGIA DEPT. OF REVENUE  
INCOME TAX DIVISION  
P.O. BOX 38395  
ATLANTA, GA. 30334  
Phone: (404) 651-9030

OFFICIAL NOTICE OF ASSESSMENT AND DEMAND FOR PAYMENT  
DEMAND IS MADE FOR THE IMMEDIATE PAYMENT OF THE TOTAL AMOUNT DUE AS SHOWN IN THIS ASSESSMENT. THIS ASSESSMENT BECOMES FINAL IN  
THIRTY (30) DAYS FROM THE DATE BELOW AND COLLECTION PROCEEDINGS WILL BEGIN AS PROVIDED BY GEORGIA LAW. BASED ON NOTICE OF PROPOSED  
ASSESSMENT FOR GEORGIA INCOME TAX PREVIOUSLY MAILED TO YOU, ASSESSMENT IS HEREBY ISSUED AGAINST YOU IN ACCORDANCE WITH I.C.G.A.,  
48-2-45. ANY APPEAL OF THIS ASSESSMENT MUST BE FILED WITHIN 30 DAYS OF THIS NOTICE IN ACCORDANCE WITH APPLICABLE GEORGIA LAW. A  
GENERAL DENIAL IS NOT SUFFICIENT AND BY LAW THE BURDEN IS UPON THE APPELLANT TO SHOW IN WHAT RESPECT THE ASSESSMENT IS IN ERROR.

DATE	JUNE 22, 1989	4300399	REICH, CHARLES J & SHIRLEY S
TAX	\$411.00	T	1106 E FAYETTEVILLE RD
INTEREST	12.33		RIVERDALE GA 30296
PENALTY	6.18		
PAYMENT	0.00		

BALANCE OVERDUE \$429.51 REFER TO: 225 46 2871 OA TAX YEAR 1988  
IF YOU HAVE PAID THIS TAX LIABILITY, WRITE DATE AND MANNER OF PAYMENT ON BACK OF THIS NOTICE  
AND RETURN IT TO THE ABOVE ADDRESS.

PLEASE STATE SOCIAL SECURITY NUMBER IN ALL CORRESPONDENCE.

This notice may not apply to you if you are in bankruptcy.  
If you have filed for bankruptcy and your case is currently  
pending, please write your case number where indicated and  
return to address furnished.

JULY 7, 1989

Case No. \_\_\_\_\_

This Notice is returned without action filed upon the following:  
a) MY LETTER TO MR JERRY A. ADAMS TAX CONSULTANT, DEPT OF REVENUE, DATED 3-30-89 and hand deliv-  
ated same DATE JUDS: Submittal of 1988 Kentucky Foster Care (w/enclosures) and Demand for a

Review of Kentucky State Taxes,

b) MY CERTIFIED MAIL # P 478 45721 TO SAME addressee, DATED 4-12-89, RECEIVED FOR 4-14-89,  
JUDS: Filing of Form, 500X fee for 1988 1989 tax all 1988 with note (a) enclosures attached where

c) STIPULATED in Civil Action # 84-REC-30 Filed 5-25-89 - WALDEN ET AL VS COLLIS ET AL, REC-1-  
mand CO. JUDICIAL COURT (copy attached)

d) MY CERTIFIED MAIL # P 478 165722 TO DEPT OF REVENUE DATED 6-14-89, RECEIVED FOR 6-17-89,

According to NOTICE of Proposed Assessment DATED 5-16-89.  
e) Oral commitment by WILSON CAWSET, ASST AG, ATTY FOR REVENUE DEPT in Civil Action # 89-CV-  
13238-4, Clayton B. Johnson Court Filed 4-14-89 These services rendered ET AL VS COLLIS  
ET AL where in oral court JUL 29 '89 During hearing on Petitioners Request for 24-  
hourly relief.

*Charles J. Reich*  
CHARLES J. REICH 225-46-2871

## IN THE SUPREME COURT OF GEORGIA

Case No. 47018

MARCUS COLLINS, INDIVIDUALLY AND IN HIS CAPACITY  
AS GEORGIA STATE REVENUE COMMISSIONER, AND THE  
GEORGIA DEPARTMENT OF REVENUE,  
*Appellants,*

v.

JAMES E. WALDRON, JACK HOBBS, WALTER CYBART,  
AND ALL RETIRED FEDERAL EMPLOYEES  
SIMILARLY SITUATED,  
*Appellees.*

[July 12, 1989]

## SUPPLEMENTAL BRIEF OF APPELLANTS

This supplemental brief is submitted by the appellants under Rule 41 of the Georgia Supreme Court to address certain issues raised in the appellees' brief and at the oral argument of this case.

## ARGUMENT AND CITATION OF AUTHORITY

The taxpayers, on pages 4 and 5 of their brief, assert that the United States Supreme Court has sanctioned escrow funds under circumstances like those here. See *American Trucking Ass'n v. Gray*, 97 L Ed 2d 790, 793 (1987). Justice Blackmun's order in *Gray*, however, was based on decisions in *Private Truck Council of America v. New Hampshire*, 517 A.2d 1150 (N.H. 1986) and *American Trucking Ass'n v. Conway*, 508 A.2d 408 (Vt. 1986), where the courts found that no refund mechanism

existed for the return of taxes erroneously or illegally collected. See *Private Truck Council*, 517 A.2d at 1155-56; *American Trucking Ass'n*, 508 A.2d at 413-14. Based on the risk that Arkansas officials would take a similar position, Justice Blackmun ordered the disputed taxes escrowed pending a decision on their constitutionality. In this case, O.C.G.A. § 48-2-35 provides a procedure for the refund of state income taxes; this adequate remedy at law distinguishes this case from *Gray*, *Private Truck Council of America v. New Hampshire*, and *American Trucking Ass'n*, and precludes the equitable relief ordered by the Richmond Superior Court.

On page 6 of their brief, the taxpayers assert that violations of constitutional rights constitute "irreparable harm" *per se*. The taxpayers presumably mean that injunctive relief is always authorized when a constitutional right is implicated—i.e., that *no* legal remedy is adequate to redress a violation of such a right. In support of this claim, the taxpayers cite certain federal decisions in cases involving First Amendment rights, claims of racial discrimination in housing, etc. See *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1423 (11th Cir. 1984) ("we believe that when housing discrimination is shown it is reasonable to presume that irreparable injury flows from the discrimination."); *Northern Pennsylvania Legal Services v. County of Lackawanna*, 513 F. Supp. 678, 685 (M.D. Pa. 1981) (First Amendment). Those cases do not stand for the broad proposition urged by the taxpayers here.

Although some courts have held that the very violation of certain fundamental constitutional rights can satisfy the irreparable harm requirement in obtaining preliminary injunctive relief, [citations omitted], the facts of this case do not fit under the ra-

tionale of those decisions. While [courts have] found that . . . First Amendment and right to privacy violations . . . could not be compensated by monetary damages or by prevailing in the litigation, the violation in this case *can* be more readily compensated.

*Cunningham v. Adams*, 808 F.2d 815, 822 (11th Cir. 1987) (emphasis in original). The taxpayers in this case challenge Georgia's income tax treatment of their federal retirement benefits. If it is eventually determined that this treatment is invalid, and that federal retirees have overpaid their state income taxes as a result, the measure of the injury is plain—it is the amount of the overpayment—and O.C.G.A. § 48-2-35 provides the legal mechanism for seeking redress.

The taxpayers' arguments in this case largely center on the fact that Georgia's refund statute does not permit class actions. They therefore conclude that the statutory procedure is inadequate for their purposes, thereby justifying the equitable relief granted by the trial court. This Court, however, disposed of an identical argument in *Blackmon v. Scoven*, 231 Ga. 307, 201 S.E.2d 474 (1973). In that case, the taxpayer disputed a penalty assessed against him when he purchased his automobile tag. The taxpayer brought a class action against the State Revenue Commisisoner and others, and he sought an injunction against the collection of such amounts, which the lower court granted. In reversing the trial court, this Court stated:

In our view the existence of the legal remedies provided by your public revenue statutes precludes the equitable class action that was sought here. In particular, the procedures set forth therein for returning illegally collected taxes . . . obviates the necessity of a class action based upon avoidance of a multiplicity of suits . . . .

. . . [I]f one successful contest of the penalty were made under [the refund statute], then the ruling would apply to all those persons in the same circumstances.

231 Ga. at 310-11, 201 S.E.2d at 477. Code Section 48-2-35 is, plainly, an adequate legal remedy for each individual taxpayer disputing Georgia's taxation of federal retirement benefits. Under the reasoning of *Blackmon v. Scoven*, the lack of a class action mechanism should not affect the analysis.

This 12th day of July, 1989.

Respectfully Submitted,

MICHAEL J. BOWERS  
Attorney General

H. PERRY MICHAEL  
Executive Assistant Attorney General

HARRISON KOHLER  
Deputy Attorney General

VERLEY J. SPIVEY  
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IN THE SUPERIOR COURT OF CLAYTON COUNTY  
STATE OF GEORGIA

Civil Action File No. 89-CV-13238-4

THREE RETIRED SOLDIERS a/k/a AVERY T. SALTER, JR.,  
CHARLES J. REICH and ROBERT L. NEAL,  
*Petitioners,*

vs.

THE STATE OF GEORGIA and GOVERNOR JOE FRANK  
HARRIS and STATE REVENUE COMMISSIONER  
MARCUS E. COLLINS, SR.,  
*Respondents.*

[Sept. 19, 1989]

ORDER

Pursuant to Rule 19.1 of the Uniform Superior Court Rules, this Court has determined that the above-styled case shall be transferred to Fulton County Superior Court, where venue appropriately lies.

IT IS THEREFORE ORDERED, DECREED AND ADJUDGED that the above-stated case be and the same is hereby transferred to Fulton County, Georgia. The Clerk of the Superior Court of Clayton County, Georgia, is hereby directed to transfer said case to Fulton County, Georgia, upon payment of costs by the Plaintiffs.

The Clerk of the Superior Court of Clayton County, Georgia, is directed to compute the court costs within Rule 19.1(G) and shall notify counsel for Plaintiffs in writing of the amount of the court costs. This action shall

stand dismissed without prejudice unless the costs are paid within twenty (20) days as provided in Rule 19.1.

This 19th day of September, 1989.

/s/ KENNETH KILPATRICK  
Judge, Superior Court  
Clayton Judicial Circuit

IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA

Civil Action File No. D-71448

AVERY T. SALTER, JR., CHARLES J. REICH,  
and ROBERT L. NEAL,  
*Petitioners,*

v.

THE STATE OF GEORGIA, GOVERNOR JOE FRANK HARRIS,  
AND STATE REVENUE COMMISSIONER  
MARCUS E. COLLINS, SR.,  
*Respondents.*

[March 27, 1990]

**ORDER**

Upon full consideration of the entire record, Respondents' Motion to Dismiss or for Judgment on the Pleadings is hereby GRANTED.

Because of the Doctrine of Sovereign Immunity, the State may not be sued without its consent. Any consent to be sued which is extended by the State may not be expanded in scope and therefore must be strictly construed. *Ingalls Iron Works Company v. Blackmon*, 133 Ga. App. 164 (1974), citing *Schaffer v. Oxford*, 102 Ga. App. 710 (1960). Section 48-2-35(b)(4) of the Official Code of Georgia Annotated expressly waives sovereign immunity and allows for actions for tax refunds be brought against the State. However, a condition precedent to the State's consent to be sued pursuant to O.C.G.A. § 48-2-35 is the filing of a claim for refund

by the taxpayer. *Blackmon v. Georgia Independent Oilman's Association et al.*, 129 Ga. App. 171, 173 (1973), citing *Henderson v. Carter*, 229 Ga. 876 (1972).

Plaintiffs have failed to satisfy the condition precedent to waiver of sovereign immunity under O.C.G.A. § 48-2-35. Neither Plaintiffs' Petition for Declaratory Judgment and Injunctive relief nor any of the amendments thereto allege facts asserting that Plaintiffs have filed a claim for a refund as required by O.C.G.A. § 48-2-35 (b)(4). Accordingly, Plaintiffs cannot, as a matter of law, have standing to sue and Defendants' Motion to Dismiss should be and is hereby GRANTED. See *Id.*

This 27th day of MARCH, 1990.

/s/ Joel J. Fryer  
Judge, Fulton Superior Court, A.J.C.

IN THE SUPERIOR COURT OF CLAYTON COUNTY  
STATE OF GEORGIA

Civil Action File Number: 90CV-18383-4

LIEUTENANT COLONEL CHARLES J. REICH,  
U.S. ARMY (RET.),

*Plaintiff*

v.

MARCUS E. COLLINS, SR., Individually and in his capacity  
as Georgia State Revenue Commissioner, and  
GEORGIA DEPARTMENT OF REVENUE,  
*Defendants*

[April 19, 1990]

COMPLAINT FOR REFUND OF  
TAXES ILLEGALLY COLLECTED

COMES NOW the Plaintiff, who files this Complaint and shows this Court the following:

-1-

Defendant, MARCUS E. COLLINS, SR., is the Commissioner of the Georgia Department of Revenue. This Defendant is subject to the jurisdiction of this Court and can be served with process by second original at 410 Trinity-Washington Building, Atlanta, Georgia, 30334.

-2-

Defendant, GEORGIA DEPARTMENT OF REVENUE, is a Department of the government of the State of Georgia. This Defendant is subject to the jurisdiction

of this Court and can be served with process by second original at 410 Trinity-Washington Building, Atlanta, Georgia, 30334.

-3-

Plaintiff resides in Riverdale, Clayton County, Georgia. Lieutenant Colonel Reich retired from the United States Army in 1978 after twenty (20) years of active service. He began receiving military retirement benefits in 1978, and has paid Georgia income tax on these benefits since then.

-4-

On April 14, 1989, Plaintiff duly filed with Defendants, claims for tax refunds for years 1980 through 1988 pursuant to Official Code of Georgia, Annotated, Section 48-2-35.

-5-

On January 23, 1990, Defendants denied said claims and refused to pay the same.

-6-

The Public Salary Tax Act of 1939, 4 U.S.C., Section 111, provides, in pertinent part, that:

The United States consents to the taxation of pay or compensation for personal services as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

-7-

In 1980, the State of Georgia amended Georgia Code Annotated, Section 91A-3607 by Ga. L. 1980, p. 21, Section 17 (now codified, as amended, as Official Code of Georgia, Annotated, Section 38-7-27), providing that public pension or retirement fund benefits paid by the State out of twelve (12) listed funds or systems were not in-

cluded in determining Georgia taxable net income. The effect of this amendment was to eliminate the State income taxation of retirement benefits paid by the State.

-8-

After the 1980 amendment to Georgia Code Annotated, Section 91A-3607, the State continued to include federal retirement benefits in Georgia taxable income for purposes of determining the tax liability of federal retirees subject to Georgia taxation.

-9-

On March 28, 1989, the United States Supreme Court ruled in *Davis v. Michigan Department of the Treasury*, (489 US —, 103 L Ed 2d 891, 109 S CT —), that income tax statutes of the State of Michigan, which provided for the taxation of federal retirement benefits, but exempted retirement benefits paid by the state and its political subdivisions, violated federal law.

-10-

Recognizing the unconstitutionality of Official Code of Georgia, Annotated, Section 48-7-27, in light of the clear mandate of the *Davis* decision, Governor Harris signed House Bill Number 1 EX into law, on September 20, 1989, providing identical income tax treatment for federal and state pensions for taxable years beginning on or after January 1, 1989.

-11-

Georgia's income taxation of Plaintiff's federal retirement benefits for years 1980 through 1988 violates: (a) the Fifth and Fourteenth Amendments of the Constitution of the United States, the Public Salary Tax Act (4 U.S.C., Section 111) and 42 U.S.C., Section 1983; (b) Article 1, Section 1, Paragraph 2 and Article 7, Section 1, Paragraph 3 of the Constitution of the State of Georgia.

## COUNT I

-12-

Plaintiff realleges paragraphs (1) through (11) of this Complaint in this Court as if fully set forth herein.

-13-

Pursuant to Official Code of Georgia, Annotated, Section 48-2-35, Plaintiff herein, having paid taxes for years 1985 through 1988 which were illegally assessed and collected, is entitled to damages equal to all Georgia income taxes paid in federal retirement benefits from 1985 through 1988, plus the legal rate of interest.

## COUNT II

-14-

Plaintiff realleges paragraphs (1) through (13) of this Complaint in this Court as if fully set forth herein.

-15-

Section 48-7-27 of the Official Code of Georgia, Annotated, in subsection (a)(4)(A), excluded from Georgia net taxable income received from twelve (12) listed state pension or retirement funds or systems. The retirement benefits of Plaintiff's retired federal pay was not so excluded.

-16-

Official Code of Georgia, Annotated, Section 48-7-27 was in violation of the nondiscrimination provision of 4 U.S.C., Section 111, and was therefore invalid. See *Davis*, *supra*.

-17-

Official Code of Georgia, Annotated, Section 48-7-27 violated the Fifth and Fourteenth Amendments to the Constitution of the United States, in that it denied Plain-

tiff equal protection of the laws, deprived him of property without due process of law and unlawfully took his property for public use without just compensation. Official Code of Georgia, Annotated, Section 48-7-27 was therefore invalid.

-18-

Official Code of Georgia, Annotated, Section 48-7-27 violated the provisions of 42 U.S.C., Section 1983, and 4 U.S.C., Section 111.

-19-

By reason of the foregoing, Plaintiff has been required to pay taxes pursuant to an invalid state scheme, and Plaintiff is entitled to damages equal to all Georgia income taxes paid on his federal retirement benefits from 1980 through 1988, plus the legal rate of interest.

WHEREFORE, Plaintiff prays as follows:

(a) that he recover of the Defendants the amount of all state income taxes paid on his federal retirement pay together with the legal interest thereon from 1980 through 1988 as well as court costs; and

(b) for such other relief as to which he may be lawfully and/or equitably entitled.

/s/

CHARLES J. REICH, LTC  
(USA Ret)  
Plaintiff  
Pro Se

1106 East Fayetteville Road  
Riverdale, Georgia 30296  
404/996-8803

IN THE SUPERIOR COURT OF CLAYTON COUNTY  
STATE OF GEORGIA

Civil Action File No: 90CV-18383-4

CHARLES J. REICH,

*Plaintiff,*

vs.

MARCUS E. COLLINS, SR., Individually and in his capacity  
as Georgia State Revenue Commissioner, and the  
GEORGIA DEPARTMENT OF REVENUE,  
*Defendants.*

[May 21, 1990]

**ANSWER**

Now come defendants Marcus E. Collins, Sr., State Revenue Commissioner, and the Georgia Department of Revenue, and answer and defend the complaint in the above-styled case as follows:

*First Defense*

The complaint fails to state a claim upon which relief can be granted against Marcus E. Collins, Sr., individually.

*Second Defense*

The complaint fails to state a claim upon which relief can be granted under 42 U.S.C. § 1983.

*Third Defense*

The relief sought by the plaintiff is partially barred by the statute of limitations and the doctrine of sovereign immunity.

*Fourth Defense*

The defendants respond to the individual paragraphs of the complaint as follows:

1 and 2.

Admit the allegations of paragraphs 1 and 2 of the complaint.

3.

Admit that plaintiff resides in Riverdale, Georgia; deny the remaining allegations of paragraph 3 of the complaint for lack of information or knowledge sufficient to form a belief as to the truth thereof.

4.

State that in or about April 1989, plaintiff filed Georgia income tax refund claims with the defendants; deny the remaining allegations of paragraph 4 of the complaint.

5.

Admit the allegations of paragraph 5 of the complaint.

6.

State that paragraph 6 of the complaint is a statement of law rather than an allegation of fact and therefore requires no response.

7.

Admit that in 1980, Georgia Code Section 91A-3607 was amended to include an income tax exemption for pension income received from the Teachers Retirement System of Georgia, and certain other public retirement systems; deny the remaining allegations of paragraph 7 of the complaint.

8 and 9.

Admit the allegations of paragraphs 8 and 9 of the complaint.

10.

Admit that on September 20, 1989, Governor Harris signed H.B. No. 1 EX into law, providing identical income tax treatment for federal, state, and private pensions for taxable years beginning on or after January 1, 1989; deny the remaining allegations of paragraph 10 of the complaint.

11.

Deny the allegations of paragraph 11 of the complaint.

12.

Defendants incorporate paragraphs 1 through 11 of this answer as if fully set forth herein.

13.

Deny the allegations of paragraph 13 of the complaint.

14.

Defendants incorporate paragraphs 1 through 13 of this answer as if fully set forth herein.

15.

Admit the allegations of paragraph 15 of the complaint.

16 through 19.

Deny the allegations of paragraphs 16 through 19 of the complaint.

20.

Deny each and every allegation of the complaint not hereinbefore specifically admitted, denied, or qualified.

21.

Deny that the plaintiff is entitled to any of the requested relief.

WHEREFORE, defendants pray:

- (1) That the Court enter judgment in favor of the defendants;
- (2) That costs be cast upon the plaintiff; and
- (3) For such other and further relief as the Court deems appropriate.

This 21st day of May, 1990.

Respectfully submitted,

MICHAEL J. BOWERS 071650  
Attorney General

/s/ \_\_\_\_\_  
DANIEL M. FORMBY 269350  
Senior Assistant Attorney General

/s/ \_\_\_\_\_  
WARREN R. CALVERT 105341  
Assistant Attorney General

PLEASE ADDRESS ALL  
COMMUNICATIONS TO:

WARREN R. CALVERT  
Assistant Attorney General  
132 State Judicial Building  
Atlanta, Georgia 30334  
Telephone: (404) 656-3340

# CERTIFICATE OF SERVICE

I do hereby certify that I have this date served a copy of the foregoing ANSWER upon:

Charles J. Reich  
P.O. Box 2117  
Jonesboro, Georgia 30237

by placing the same into the United States mail with adequate first class postage placed thereon.

This 21st day of May, 1990.

/s/ \_\_\_\_\_  
WARREN R. CALVERT  
Assistant Attorney General

# IN THE SUPERIOR COURT OF CLAYTON COUNTY STATE OF GEORGIA

Case No. 90-CV-18383-4

CHARLES J. REICH,  
*Plaintiff,*  
v.

MARCUS E. COLLINS, SR., Individually and in his capacity  
as Georgia State Revenue Commissioner, and the  
GEORGIA DEPARTMENT OF REVENUE,  
*Defendants.*

[Oct. 18, 1991]

# MOTION FOR SUMMARY JUDGEMENT

The above-entitled matter came on for hearing before the HONORABLE KENNETH KILPATRICK, Judge, on October 18, 1991, in the Clayton County Judicial Circuit, commencing at approximately 3:40 p.m.

# APPEARANCES:

For the Plaintiff: Carlton Henson,  
Attorney at Law

For the Defendant: Warren Calvert,  
Attorney at Law

## TRANSCRIPT OF PROCEEDINGS

THE COURT: Let the record show this is the case of *Charles J. Reich versus Marcus E. Collins, Senior, individually and in his capacity as Georgia State Revenue Commisisoner, and the Georgia Department of Revenue*, Civil Action File 90-CV-18383-4. I believe that both parties have filed a motion for summary judgment; is that correct?

MR. HENSON: That's correct.

MR. CALVERT: That's correct, Your Honor, that's fine.

THE COURT: Okay. And both parties wish to argue their own and are prepared to argue against the other; is that right?

MR. HENSON: That's correct, Your Honor.

MR. CALVERT: That's correct, Your Honor.

THE COURT: All right. Now may I ask counsel for the State, which I guess would be appropriate at this time, to bring me up to speed, if there's any speed on, on these matters generally, because, frankly, I had not thought about this particular thing in some time.

As I remember, there was litigation going on in Richmond County on this subject; there was litigation going on in Fulton County on this subject, and I had thought all issues relative to these matters would be disposed of either through Judge Fleming's court, I think [2] it was, in Augusta—this is from my memory a year or two ago—or in whomever's court in Fulton County, and I have not given these matters any more thought. So from the State's perspective can you sort of tell me where we are on those sorts of things.

MR. CALVERT: Yes, Your Honor.

The cases that you're referring to are cases that were filed immediately in the aftermath of the U.S. Supreme Court's decision in *Davis*. There was the case that was filed here in Clayton Superior Court. Mr. Reich was a Plaintiff in that case.

THE COURT: I believe Mr. Salter was a Plaintiff in that case.

MR. CALVERT: He was also a Plaintiff as well and represented the Plaintiffs in that action. That was a declaratory judgment action.

A similar action was filed in Richmond Superior Court on behalf of Mr. Waldron and some other Plaintiffs. A third action was filed in Federal District Court for the Northern District of Georgia on yet another group of taxpayers who were represented by Mr. Henson.

What happened with those cases is the case before the court in Clayton County as well as the case that Judge Fleming had were transferred to Fulton County because that's where venue lay. Both of those cases were [3] subsequently dismissed because they were the wrong type of actions. They were declaratory judgments as opposed to refund actions brought under our statute. And when the Georgia General Assembly amended Georgia's income tax provisions for the tax years 1989 and forward, there simply was no controversy as to the present that would permit those cases to lie and they were dismissed.

The case that was brought in Federal Court was dismissed and the dismissal was affirmed in the Eleventh Circuit under the Federal Tax Injunction Act which basically says in tax matters you have to go into State Court if there's an appropriate remedy provided.

While those cases were going on, Mr. Reich elected to file a refund action under 48-2-35 which is Georgia's refund statute. As a consequence, his case has been proceeding forward essentially as the test case on the merits of the issue. There are other cases that are now pending in other Superior Courts. There are two cases pending in Fulton Superior Court, Plaintiffs who are represented also by Mr. Henson. There are two other cases pending in Dekalb Superior Court and there's one case pending in Dougherty Superior Court. Those cases have either been formally stayed by order of the Superior Courts or have

effectively been stayed by consent of the parties pending a disposition of the merits in this [4] litigation.

THE COURT: Good enough. That's where we are.

Hr. Henson, would you like to fill in anything in there?

MR. HENSON: No, I think Mr. Calvert has summarized it well, Your Honor. Basically, the other Superior Court has punted this matter to you.

THE COURT: All right.

MR. HENSON: And that's why we're here today.

THE COURT: All right. I don't run away from them. Maybe that's why I'm getting this because I don't do that. I'll be delighted to hear it and decide it.

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[The December 10, 1991 Order issued by the Superior Court of Clayton County, State of Georgia, Judge Kenneth Kilpatrick, is reproduced at Appendix E to Petition for Certiorari]

[The November 19, 1992 Decision of the Georgia Supreme Court is Reproduced at Appendix D to Petition for Certiorari]

[The December 2, 1993 Decision of the Georgia Supreme Court is reproduced at Appendix A to Petition for Certiorari]